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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS ISRAEL and
WISCONSIN ATTORNEY GENERAL,
Petitioners,

v.

ROBERT WALBERG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in resolving a Sixth Amendment claim of ineffective assistance of counsel caused by pretrial judicial misconduct, a court complies with *Strickland v. Washington*, 104 S. Ct. 2052, *reh'g denied*, 104 S. Ct. 3562 (1984), and *United States v. Cronic*, 104 S. Ct. 2039 (1984), when it relieves the defendant of his obligation to prove specific acts or omissions of counsel, and precludes the prosecutor from proving harmless error.

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1) *Walberg v. Israel*, No. 84-2435 (7th Cir. July 1, 1985) (slip opinion) (not yet reported) (Pet-Ap. 101-14);

2) *Walberg v. Israel*, 587 F. Supp. 1476 (E.D. Wis. 1984) (Pet-Ap. 115-23);

3) *State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1982) (Pet-Ap. 124-39);

4) *State v. Walberg*, 105 Wis. 2d 764, 318 N.W.2d 23 (Ct. App. 1981) (table) (unpublished opinion) (Pet-Ap. 140-43).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 1, 1985, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28:

> **§ 2254....**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 23, 1978, a jury in Milwaukee County Circuit Court convicted defendant Robert Walberg on two burglary-related felony counts, each enhanced by Walberg's status as a habitual criminal. "[T]he evidence of Walberg's guilt was overwhelming — one of the people who lived in the apartment that Walberg burgled was in the apartment at the time and identified Walberg, who moreover admitted his participation in the burglary to the police (and the admission was in evidence)."[1]/ Other evidence consisted of the tenant's description of the

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[1]/ *Walberg v. Israel*, No. 84-2435, slip op. at 5-6 (7th Cir. July 1, 1985) (Pet-Ap. 105-06).

automobile (including the license plate number) in which Walberg and his colleague escaped[2]/ and a black vinyl gym-type bag marked "R. Walberg" that the tenant had seen in the apartment when he confronted the two burglars.[3]/ Walberg's defense "consisted entirely of [Walberg's] testimony in which he stated that he was present at the burglary scene but did not realize a burglary was in process."[4]/ Milwaukee County Circuit Court Judge Christ T. Seraphim, who presided at pretrial and trial proceedings, sentenced Walberg to two consecutive terms of fourteen years in prison on each count. Each sentence included five years for habitual criminality.

Rather than appeal his conviction directly, Walberg sought collateral relief in accordance with Wisconsin law.[5]/ On March 10, 1981, Milwaukee County Circuit Court Judge Robert W. Landry held a hearing on Walberg's post-conviction motion. At the hearing's conclusion, he orally denied Walberg's motion.[6]/ A written order was entered on March 25, 1981. In an unpublished opinion, the Wisconsin Court of Appeals affirmed Judge Landry.[7]/ The Wisconsin Supreme Court granted Walberg's petition for review and affirmed the court of appeals.[8]/

On March 8, 1983, in the United States District Court for the Eastern District of Wisconsin, Walberg filed a

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[2]/Answer to Petition for Writ of Habeas Corpus, Exhibit O, pages 227-29. Subsequent references to the Answer will be designated by "Answer" [Exhibit]:[page]."

[3]/Answer O:231-32.

[4]/*Walberg*, 109 Wis. 2d at 111, 325 N.W.2d at 695 (Pet-Ap. 139).

[5]/Wis. Stat. § 974.06 (1977).

[6]/Answer P:21, *reprinted at* Pet-Ap. 187.

[7]/Answer K:101-06, *reprinted at* Pet-Ap. 140-43.

[8]/*State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1982) (Pet-Ap. 124-39).

petition for a writ of *habeas corpus* under 28 U.S.C. § 2254. Neither Walberg nor respondent Thomas Israel, the warden of the correctional facility in which Walberg is incarcerated, and respondent Wisconsin Attorney General requested a hearing on the petition. Following submission of briefs, United States District Court Judge Terence T. Evans denied the petition.[9]/

Walberg appealed to the United States Court of Appeals for the Seventh Circuit. With one judge dissenting, the court reversed the district court and granted Walberg a new trial.[10]/

Walberg's *habeas* relief arose from his claim that misconduct by Judge Seraphim deprived him of effective assistance of counsel and an unbiased judge. Walberg has never claimed that Judge Seraphim conducted himself improperly at the trial.[11]/ Rather, he has asserted only that misconduct by Judge Seraphim during two pretrial hearings may have chilled the performance of Walberg's defense counsel, Donald Clark, resulting in ineffective assistance of counsel.[12]/ Judge Seraphim's

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[9]/ *Walberg v. Israel*, 587 F. Supp. 1476 (E.D. Wis. 1984) (Pet-Ap. 115-23).

[10]/ *Walberg v. Israel*, No. 84-2435 (7th Cir. July 1, 1985) (slip op.) (not yet reported) (Pet-Ap. 101-14).

[11]/ *Walberg*, 109 Wis. 2d at 109, 325 N.W.2d at 694 (Pet-Ap. 137) ("[T]here is no claim of error during the trial.... The parties agree that there was no misconduct on the part of Judge Seraphim *at trial* to support the allegation that the defendant was denied his rights to effective assistance of counsel and an impartial judge" (emphasis in original)).

[12]/ *Id.* The Wisconsin Supreme Court found "nothing in the record to support [Walberg's] contentions." *Id.* at 110, 325 N.W.2d at 694 (Pet-Ap. 138); *see generally id.* at 110-11, 325 N.W.2d at 694-95 (Pet-Ap. 138-39). *See also Walberg*, 587 F. Supp. at 1479-80 (Pet-Ap. 120). The Seventh Circuit did not disagree with the fact findings of either the Wisconsin Supreme Court or the Eastern District of Wisconsin. *Walberg*, slip op. at 10 (Pet-Ap. 110).

misconduct occurred during a pretrial hearing on March 6, 1978, held to address several defense motions (including one for a change of venue and another to suppress evidence), and at another pretrial hearing on June 19, 1978, held to deal with developments arising out of the motion for a change of venue.

At the March 6 hearing, Judge Seraphim made pointed comments about the tactics of Walberg's attorney; comments expressing exasperation with inconsistency in some prosecution witnesses' testimony;[13]/ and comments allegedly ridiculing Walberg's testimony. Judge Seraphim's remarks generally reflected irritation with the unnecessarily long time taken to address the motions,[14]/ delay he felt resulted principally from the defense attorney's tactics (including motions the district court decision described as "caviling"[15]/).

The Seventh Circuit specifically noted Judge Seraphim's remark that Walberg's counsel would prefer not to have anyone arrested.[16]/ The court also noted Judge Seraphim's anticipatory responses to Clark's questions to Walberg,[17]/ which occurred after Walberg repeatedly contradicted the testimony of five police officers who had been sequestered during the hearing, and Judge Seraphim's obvious incredulity at Walberg's assertion that he

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[13]/Answer O:85, Pet-Ap. at 160. The Seventh Circuit's decision noted in connection with these remarks that Judge Seraphim had earlier granted a sequestration motion made by the prosecutor. *Walberg*, slip op. at 3 (Pet-Ap. 103). The sequestration motion actually came from Walberg's attorney, not from the prosecutor. *See* Answer O:27.

[14]/*See, e.g.*, Answer O:147, Pet-Ap. at 164.

[15]/*Walberg*, 587 F. Supp. at 1481 (Pet-Ap. 123).

[16]/*Walberg*, slip op. at 3 (Pet-Ap. 103). For the full colloquy leading to this remark, *see* Answer O:130-31.

[17]/*Walberg*, slip op. at 3-4 (Pet-Ap. 103-04).

had been denied a request to use the bathroom.[18]/ Other instances of Judge Seraphim's blunt style in this hearing are reprinted at pages 145-70 of petitioners' Appendix.[19]/

The hearing on June 19 concerned Walberg's motion to change venue, which Judge Seraphim had not yet granted. Richard Klinkowitz, the assistant district attorney prosecuting Walberg, informed Judge Seraphim that a Wisconsin Supreme Court justice would probably order the trial stayed until the change of venue problem could be litigated. Klinkowitz then asked Judge Seraphim to move the trial to another county. Judge Seraphim reluctantly agreed and directed Klinkowitz to call the court administrator and make arrangements for another court. The court recessed at that point.

When the judge and counsel returned from the recess, Walberg's attorney addressed the court:

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[18]/*See* Answer O:134:

Q [by Mr. Clark] To whom did you make that request [to use the restroom]?

A [by Mr. Walberg] I made it as soon as we got to the Safety Building. I made it coming up the hall. I was left alone with a uniformed officer for a good half hour.

THE COURT: Do you believe that, that they would deny him to go to the restroom, do you actually believe that, Mr. Clark, that a prisoner in Milwaukee, Wisconsin, 1978, do you really believe that, or do you really want me to believe that?

THE WITNESS: I was told, "In a little while when we get to you."

THE COURT: Mr. Walberg — I won't say it. Continue.

[19]/In denying Walberg's post-conviction motion in state court, Milwaukee County Circuit Court Judge Robert W. Landry noted the relationship between Walberg's complaint and Judge Seraphim's personal style:

THE COURT: ...

... [I]t is well known that Judge Chris [*sic*] Seraphim,

MR. CLARK: Your Honor, I also have a motion.

THE COURT: What is your motion?

MR. CLARK: Your Honor, *based on the events of this morning,* I filed a motion with the Court and would move Your Honor to recuse himself as the trial judge in this matter and refer this matter back to the Clerk of Circuit Court for reassignment.

If Your Honor may recall, there was an exchange of words. Words were said by the Court to defense counsel in this matter, and particular, the Court's final statement to myself, which I wrote down immediately, was, "I am going to fix you on the trial of this case."[20/]

Clark's statement prompted the following colloquy (reprinted here in full):

THE COURT: There was more than that, sir. This trial in this case, if I may use the vernacular, horsing this case around, we are going to try this case. I am not going to recuse

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in fact, resorted to this technique [*i.e.*, vigorous criticism of trial lawyers] to speed up cases in his court, and in fact it resulted in his trying cases in a fraction of the time that it took many of the rest of us to try cases.

He was very outspoken when it came to dealing with attorneys in his courtroom.

Answer P:17, Pet-Ap. 184-85. *See also* Answer O:161, Pet-Ap. 181 (Judge Seraphim: "[T]he way the Court handled the situation is the way I handled every attorney for eighteen years who has acted up in my court, friend or foe"). Judge Seraphim's demeanor yielded "more than 100 cases" over the years seeking reversal on grounds of judicial misconduct. *In Matter of Complaint Against Seraphim,* 97 Wis. 2d 485, 511, 294 N.W.2d 485, 499 (1980).

[20/]Answer N:4-5, Pet-Ap. 174 (emphasis added). In his Seventh Circuit brief, Walberg described Judge Seraphim's June 19 comment as occurring "[s]hortly after" (p. 14) the judge's remarks made on March 6 and as related to events occurring before June 19.

myself. I have now made arrangements, Mr. Clark, and I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, when you were a lawyer, and I did which you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there when you came and asked me that, and I had you in the District Attorney's Office. I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's, and I was a good friend of your father's.

MR. CLARK: I appreciate —

THE COURT: Just let me finish, sir. It is that attitude, sir, that attitude, sir, that is going to get you nowhere in the Courts of Milwaukee as long as I'm around.

I will show no prejudice to this defendant. He's going to get a fair trial. The best thing that can happen to this defendant is that if I do not give him a fair trial, because this case will probably never be tried again if I make a mistake. I'm not going to make a mistake. This case is going to be tried. It's going to be tried three days from now, Mr. Clark.

Your motion is denied. This case will be tried on Thursday morning at 9:00 o'clock in Fond du Lac County in Judge Murphy's courtroom.

MR. CLARK: May I make an offer of proof, Your Honor?

THE COURT: You are going to try this case, Mr. Clark.

MR. CLARK: Okay, Your Honor. I wish —

THE COURT: I have no prejudice against

you except the methods that certain lawyers use, that you have used, that I disapprove of. I have no personal personal [*sic*] prejudice against you. Now, this — you know I'm a hard line judge on these matters. I want to see my cases tried. I will — the record will speak for itself as to whether I will hold prejudice against you.

MR. CLARK: I understand that, Your Honor. For the record, I would like to inform Your Honor and Mr. Klinkowitz that I will be going to the Supreme Court to seek an order to show case [*sic*] and a restraining order against Your Honor, and also, rather, a writ of prohibition, mandamus or habeus [*sic*] corpus or what other relief may be —

THE COURT: Can't you name a few more, Mr. Clark? Mr. Clark, I personally — and I will put this on the record — am very ashamed of your conduct in this case, because you don't want Mr. Walberg tried, do you? Do you? I'm asking you a question.

MR. CLARK: Well, Your Honor, I'm —

THE COURT: You asked me to give you a change of venue, and I did. Do you want Mr. Walberg to get a trial?

MR. CLARK: I would like him to get a fair and impartial trial.

THE COURT: Well, you are going to get one, but not if you keep bringing motions, I will tell you this. I'm not going — don't ever come to me with your bill on this thing, because I am not going to pay for all these motions that you are bringing up in the Supreme Court. I am not going to pay for them because I think they are unnecessary. I will tell you now.

MR. CLARK: Well, I have a duty to bring them, Judge.

THE COURT: You have no duty to bring them. Every lawyer can say that about any motion he brings. "I'm defending my client."

Do you wish to say anything for the record, Mr. Klinkowitz, to clear up this colloquy between lawyer and Judge at the side bar when he came up and said, "Did you speak to the Judge," which was an insult to the Court. The District Attorney had not made any comments to me at all. He didn't even talk to me today.

MR. KLINKOWITZ: Judge, I —

THE COURT: And it was an insult to this Court what you did, suggesting that the District Attorney had conferred privately with the Judge without you being present.

MR. CLARK: Your Honor, I asked him directly to his face off the record on the side.

THE COURT: And my statements were off the record. I said them to you off the bench, and for you to say that I am prejudice [*sic*] against you and that this man can't get a fair trial is an abominable lie.

MR. KLINKOWITZ: Judge, if I may, I would only like to say this: That the question that the Court has alluded to was asked of me by Mr. Clark. I had not seen this Court in any capacity for two weeks having just returned from two weeks off, because of military obligations. The only time I had seen this Court today was when the Court was on the bench.

THE COURT: Of course.

MR. KLINKOWITZ: I had no conferences with you, nor to my knowledge did anyone from the District Attorney's Office.

THE COURT: No, but Mr. Clark evidently is going to practice law this way, if he doesn't get his way, that there is some conspiracy between the prosecutor and Judge and heaven knows who else.

Now, you be ready for trial Thursday morning. No Supreme Court, I'll assure you, is going to grant you [*sic*] motion on this, and you better be ready to finish this trial in two days, because it is a simple burglary.[21]/

After discussion about adjourning to another day, Judge Seraphim concluded the hearing with the following comment:

THE COURT: I will assure you of one other thing. Might as well put everything on the record, because this Court always speaks his mind. I will never waste the taxpayers' money again. I assure you.[22]/

On June 21, before resuming the adjourned hearing and with all counsel present, Judge Seraphim addressed once more the events of June 19. The relevant portion of the June 21 transcript appears at pages 179-81 of petitioners' Appendix.

Based on Judge Seraphim's conduct at these pretrial hearings (especially at the June 19 proceeding), Walberg claimed that he had been denied effective assistance of counsel and an unbiased judge.

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[21]/Answer N:5-9, Pet-Ap. 174-77. The transcript of the full June 19 hearing appears at pages 171-78 of petitioners' Appendix.

[22]/Answer N:10, Pet-Ap. 178.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION REPRESENTS A SIGNIFICANT AND UNWARRANTED DEPARTURE FROM THIS COURT'S DECISIONS IN *STRICKLAND* AND *CRONIC*.

The Seventh Circuit's decision deserves review for two reasons. First, the decision creates a new *per se* standard — governmental rectitude — for evaluating Sixth Amendment ineffective-assistance-of-counsel claims. The Seventh Circuit's test grants relief based on judicial misconduct without requiring any showing by the defendant that the misconduct actually affected defense counsel's performance. The decision thus imports a Fourth Amendment "exclusionary rule"-type analysis into Sixth Amendment doctrine: the defendant goes free because the magistrate blundered, not because defense counsel failed to perform adequately or because the defendant failed to receive a fair trial. This Court's decisions have never implied support for severing the link between the error claimed by defendant and review both of defense counsel's actual performance and of the fairness of the trial overall.

Second, the Seventh Circuit's decision significantly departs from existing Sixth Amendment ineffectiveness-of-counsel doctrine by presuming the existence of prejudicial ineffectiveness based solely on pretrial judicial misconduct and then precluding analysis for harmless error. Specifically, the Seventh Circuit's decision categorized Walberg's claim as one of ineffective assistance of counsel because of state interference. *Walberg*, slip op. at 9-10 (Pet-Ap. 109-10). *Strickland v. Washington*, 104 S. Ct. 2052, 2067, *reh'g denied*, 104 S. Ct. 3562 (1984); *United States v. Cronic*, 104 S. Ct. 2039, 2047 & n.25 (1984). The court granted *habeas* relief by inferring prejudicial and harmful ineffectiveness even though all judicial miscon-

duct occurred at pretrial proceedings outside the presence of Walberg's jury; "there is no evidence or even the contention by [Walberg], that the jury which convicted [him] was in any way influenced by the conduct of the trial court," *Walberg*, 109 Wis. 2d at 110, 325 N.W.2d at 694 (Pet-Ap. 138); "Judge Seraphim did not misbehave during the trial," *Walberg*, slip op. at 5 (Pet-Ap. 105); "there is no proof that [Walberg's attorney] pulled his punches at trial," *id.* at 7 (Pet-Ap. 107); "there is no evidence in the record" that Walberg's attorney was chilled in his representation during pretrial or trial proceedings, *Walberg*, 109 Wis. 2d at 109-10, 325 N.W.2d at 694 (Pet-Ap.137-38); and "the evidence of Walberg's guilt was overwhelming," *Walberg*, slip op. at 5 (Pet-Ap. 105). Except for absolute denials of counsel, absolute prevention of assistance during a critical stage of a criminal proceeding, or compulsory representation of conflicting interests, this Court has not endorsed a rule of presumptively prejudical ineffectiveness or of *per se* harm flowing from error arising only at pretrial stages.

II. THE SEVENTH CIRCUIT'S DECISION APPLIES TO A SIXTH AMENDMENT INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM A "GOVERNMENTAL RECTITUDE" ANALYSIS THAT EXAMINES ONLY THE GOVERNMENT AGENT'S CONDUCT AND IGNORES THE ACTUAL EFFECT THE AGENT'S CONDUCT HAS ON DEFENSE COUNSEL'S PERFORMANCE AT TRIAL, THUS EFFECTIVELY IMPORTING AN ANALOGUE OF THE FOURTH AMENDMENT "EXCLUSIONARY RULE" INTO SIXTH AMENDMENT DECISION MAKING.

The Seventh Circuit's decision divorces the pretrial "state interference" allegedly causing ineffective assistance from any evaluation of the actual effect the interference had on counsel's representation or on the fairness of the trial. Consequently, "even if the lawyer's actual performance was flawless," *Cronic*, 104 S. Ct. at 2043, the Seventh Circuit's test requires reversal and a new trial simply because a judge exhibits inappropriate testiness. Thus, the defendant obtains relief merely because the magistrate blundered, even though (as here) the defendant makes no claim that the blunder actually had *any* effect on the fairness of his trial.

This Court's precedents neither support — nor imply support for — such exclusionary analysis under the Sixth Amendment. Under *Strickland*, 104 S. Ct. 2052,

> [a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case.

Id. at 2066. *Cf. Cronic*, 104 S. Ct. at 2043 (Court of Appeals erred in utilizing inferential test ignoring counsel's actual performance and fairness of trial).

A "state interference" claim burdens the defendant with only one new element under the *Strickland* "performance" test: identification of state conduct that may result in ineffective assistance. Except when the state absolutely denies counsel or absolutely prevents counsel from exercising independent judgment, *Cronic*, 104 S. Ct.

at 2047 n.25, mere identification and proof of such state conduct does not relieve the defendant from linking the state's conduct with specifically identified "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," *Strickland*, 104 S. Ct. at 2066.

Here, Walberg identified specific state conduct — "the angry and injudicious manner in which Judge Christ T. Seraphim ... conducted himself ... in the pretrial phase of the case," *Walberg*, slip op. at 3 (Pet-Ap. 103) —that allegedly caused ineffective assistance. He did not, however, identify any acts or omissions of defense counsel; rather, he claimed that Judge Seraphim's conduct *might* have inhibited defense counsel's performance in some unspecified way and, in effect, invited reviewing courts to infer the existence of a chill from Judge Seraphim's "intemperate and improper courtroom conduct," *Walberg*, 587 F. Supp. at 1477 (Pet-Ap. 116).

A unanimous Wisconsin Supreme Court refused to speculate about acts or omissions Walberg could not — or would not — identify, and it emphatically rejected any notion that Judge Seraphim in fact inhibited defense counsel's performance. *Walberg*, 109 Wis. 2d at 110, 325 N.W.2d at 694 (Pet-Ap. 138). *See also Walberg*, 587 F. Supp. at 1479-80 (Pet-Ap. 120).[23/]

The Seventh Circuit, however, accepted Walberg's claim that the mere possibility of "chill" — even when defense counsel actually performed effectively — satisfied this *Strickland* requirement. It granted *habeas* relief because "[t]he judge *may* have cowed Walberg's lawyer," *Walberg*, slip op. at 12 (emphasis added) (Pet-Ap. 112).

[23/] *Cf. id.* at 1479 (Pet-Ap. 120) (noting that "defense counsel was given the opportunity to voice his apprehensions about Judge Seraphim's actions, ... and Judge Seraphim was given the opportunity to weigh the allegations. ... Judge Seraphim explained the reasons for his ire and should have put defense counsel's apprehensions to rest. Furthermore, Judge Seraphim's unassailed conduct at trial corroborates his pretrial assurances").

The Seventh Circuit's inferential approach thus relieved Walberg of any obligation to identify specific examples of ineffectiveness — an approach neither *Strickland* nor *Cronic* permits when a defendant actually has counsel present and rendering active assistance. It also ignored the actual effect of the state agent's conduct as revealed by the record as a whole, an evaluation *Cronic* requires when a court proceeds through inference in the absence of either a denial of counsel or a complete "breakdown in the adversarial process," *Cronic*, 104 S. Ct. at 2049.

The Seventh Circuit's exclusive concentration on the trial judge's conduct implicitly invokes Fourth Amendment exclusionary standards for "enforc[ing] ideals of governmental rectitude," *United States v. Leon*, 104 S. Ct. 3405, 3413 (1984) *(quoting United States v. Payner*, 447 U.S. 727, 734 (1980)). This approach substantially departs from established Sixth and Fourteenth Amendment standards for assuring that a defendant received a fair trial. While traditional Fourth Amendment exclusion analysis focuses principally on the propriety of government conduct, this Court has consistently evaluated claimed Sixth Amendment violations by reviewing the actual effect of the state's conduct on defense counsel's performance. *Cf. Strickland*, 104 S. Ct. at 2064 ("The benchmark for judging *any* claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (emphasis added)). The Seventh Circuit's decision thus rejects *Strickland*'s "actual impact" approach and applies instead — apparently for the first time — a "governmental rectitude" model traditionally associated with the Fourth Amendment.

This new Sixth Amendment *per se* standard requires review because of its substantial departure from recognized doctrines which this Court and lower federal courts have consistently followed.

III. IN PRECLUDING THE PROSECUTION FROM PROVING THE HARMLESSNESS OF ANY ERROR, THE SEVENTH CIRCUIT'S DECISION SIGNIFICANTLY EXTENDS SIXTH AMENDMENT *PER SE* HARMFULNESS RULES FAR BEYOND THE LIMITS STATED OR IMPLIED IN THIS COURT'S DECISIONS.

The Seventh Circuit's decision recognized that in light of the entire record, "[i]t seems ... that however antically Judge Seraphim behaved in the pretrial proceedings, and however harsh he may have been in his sentencing of Walberg, any error in his conduct of the case was harmless." *Walberg*, slip op. at 6 (Pet-Ap. 106). The court nonetheless precluded harmless error analysis, asserting that "there are limitations to the doctrine of harmless error." *Id.* (Pet-Ap. 106). Although the Seventh Circuit's opinion does not precisely describe the point beyond which harmless error no longer applies to claims of ineffective assistance, analysis for harmless error evidently does not occur "[w]hen the state ... 'interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense,'" *id.* at 9 (Pet-Ap. 109) (*quoting Strickland*, 104 S. Ct. at 2064), and causes an "inept defense," *Walberg*, slip op. at 9 (Pet-Ap. 109).

The Seventh Circuit's assertion that Walberg's case falls outside the harmless-error arena lacks support in this Court's precedents. The cases cited in the portion of *Strickland* on which the Seventh Circuit relied (as well as cases cited in *Cronic*, 104 S. Ct. at 2046-47 & n.25) highlight the Seventh Circuit's sharp departure from the limiting principles found in those decisions. Under the Sixth Amendment, this Court has presumed irrebuttably harmful ineffectiveness in only three settings:

(1) When a defendant has been completely denied counsel at a critical stage of a criminal proceeding, *Geders v. United States*, 425 U.S. 80 (1976) (prohibiting defendant from consulting with counsel during overnight recess); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (defendant did not have counsel to assist him at preliminary hearing at which defendant entered guilty plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (no counsel at arraignment for a capital offense); *Williams v. Kaiser*, 323 U.S. 471 (1945) (no assistance of counsel at entry of guilty plea);

(2) When the state erects so absolute a barrier to counsel's exercise of independent judgment that even counsel's most vigorous efforts could not circumvent the obstruction, *Herring v. New York*, 422 U.S. 853 (1975) (prohibiting defense counsel from presenting summation at the close of bench trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (enforcement of state statute requiring defendant desiring to testify to do so before presenting any other testimony for the defense); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (state statute precluding defendants from testifying under oath and judicial prohibition on counsel assisting defendant in presentation of unsworn statement); or

(3) When a court compels counsel, over objection, to represent at a joint trial codefendants with conflicting interests, *Holloway v. Arkansas*, 435 U.S. 475 (1978).

None of the conditions found in this Court's "*per se* harmful ineffectiveness" cases existed in Walberg's

case.[24]/ Walberg had counsel at all stages of the criminal proceedings. The Seventh Circuit acknowledged that "there is no proof that [Walberg's attorney] pulled his punches at trial" (slip op. at 7; Pet-Ap. 107). Walberg has not claimed any judicial misconduct by Judge Seraphim at trial or claimed that the jury was affected by–or even aware of — Judge Seraphim's pretrial misconduct. Nor has Walberg ever suggested any way in which a new trial with a new defense attorney or new trial judge (or both) holds even a remote hope for a result different from that of his original trial.

In short, no factors in Walberg's case justify precluding harmless-error analysis. In assuming harmfulness *per se* as a result of pretrial injudiciousness, the Seventh Circuit's decision takes harmless-error analysis into territory far beyond the limitations found in this Court's precedents, and it does so without suggesting an identifiable limiting principle of its own. This Court should review the Seventh Circuit's decision to determine for itself whether to permit such an extension.

CONCLUSION

The Seventh Circuit's decision marks a significant and unwarranted departure from Sixth Amendment ineffective-assistance-of-counsel principles set forth or contemplated by this Court's decisions. This Court should grant this petition for *certiorari* and review the Seventh Circuit's decision for consistency with Sixth Amendment and Fourteenth Amendment standards for deciding claims of ineffective assistance of counsel.

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[24]/In circumstances where this Court's precedents would permit a presumption of harmfulness from ineffective assistance, the Seventh Circuit itself recently declined to forgo harmless error analysis. *Siverson v. O'Leary*, 764 F.2d 1208, 1215-21 (7th Cir. 1985) (defense counsel's voluntary absence during jury deliberations and return of verdict was presumptively prejudicial error; appellate court found error harmless beyond a reasonable doubt).

Dated this 28TH day of August, 1985.

Respectfully submitted,

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